U.S. Department of Justice
Criminal Division
Asset Forfeiture and Money Laundering Section

Quick Release

A Monthly Survey of Federal Forfeiture Cases

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Pre-judgment Interest

- **Ninth Circuit holds that the Government need only disgorge interest it actually earns on seized funds when it has to return money to a successful claimant.**
- **The court's earlier ruling that the Government has to pay an amount equivalent to what the Treasury saved by not having to borrow to finance the national debt applies only where the seized money earns no interest while in the Government's possession.**

The Government seized $314,556 from the defendant and filed a civil forfeiture action based on violations of the anti-structuring statute, 31 U.S.C. § 5324. The money was deposited in the "suspense account" of the Department of the Treasury's Forfeiture Fund, pursuant to 31 U.S.C. § 9703(a), where it was invested in 30-day Treasury securities.

Following the Ninth Circuit's decision in *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996) (any forfeiture for a currency reporting violation is excessive *per se*), *cert. granted*, 117 S. Ct. 1841 (MEM) (1997), the district court dismissed the forfeiture action and ordered the Government to return the seized property to the defendant with interest, pursuant to *United States v. $277,000*, 69 F.3d 1491 (9th Cir. 1995). The parties disputed the appropriate way of calculating the amount of interest the Government was required to pay.

In *$277,000*, the court held that when the Government must return seized funds to a successful claimant, it must disgorge any interest it actually earned on the money, or if the money was not deposited in an interest-bearing account, the amount constructively earned as measured by the amount the Government did not have to borrow to finance the national debt. In this case, the defendant argued that the court was required to hold an evidentiary hearing to determine how the Government used his money while it was in government custody, and what benefit the Government realized by not having to borrow the money to finance the debt. Alternatively, the defendant argued that at least he was entitled to a sum equal to what the Government could have earned if it had invested his money at a higher interest rate than it did. The district court, however, ruled that it was sufficient for the Government simply to pay the defendant the amount of interest it actually earned by investing the money in 30-day Treasury securities through the Treasury Forfeiture Fund. The defendant appealed.

marijuana and also seized numerous baggies with marijuana residue from both the claimant and his daughter's bedrooms.

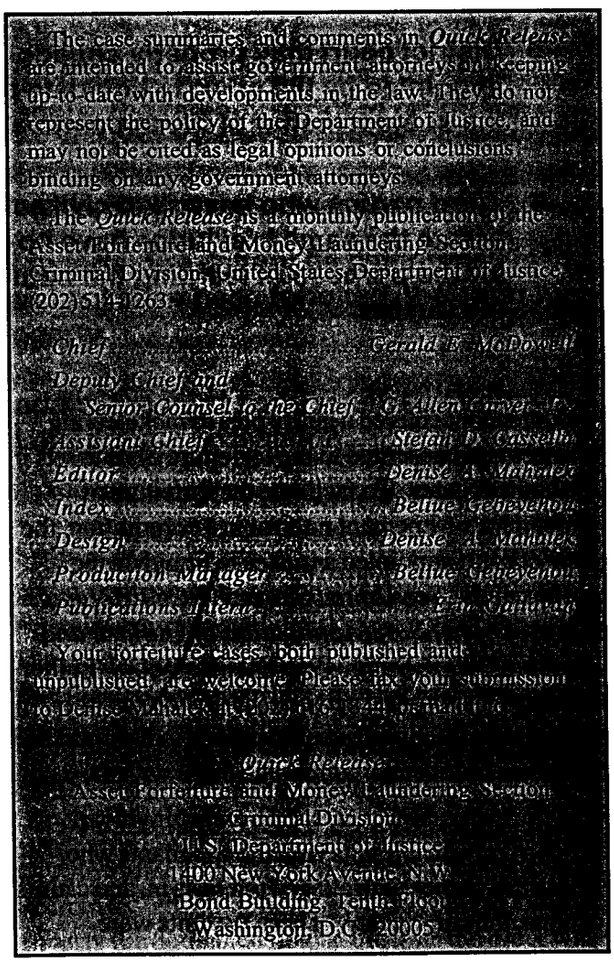
Six days later, the police again searched the property with drug-sniffing dogs after neighbors reported that the claimant's family often dug in the ground at night. The police found a can wrapped in plastic buried in a planter and brought it into the house. The claimant, upon seeing the unwrapped can, rolled his eyes skyward, said "Oh, no!" and buried his head in his arm. The police later recovered three more cans in the yard. The cans contained a total of 538.3 grams of marijuana. The claimant was arrested on drug charges.

A federal forfeiture action was filed against the real property. Following entry of the judgment of forfeiture, the property was sold. The net amount realized from the sale after payments of loans, secured bail bonds, and fees, was $20,863.64. The district court held that the forfeiture did not violate the Excessive Fines Clause, and the **Ninth Circuit** affirmed.

The panel applied the Ninth Circuit's combined "instrumentality/proportionality" standard first articulated in *United States v. 6380 Little Canyon Road*, 59 F.3d 974 (9th Cir. 1994), under which the Government must first satisfy an "instrumentality" prong and the claimant must thereafter attempt to make a showing of gross disproportionality. The panel concluded that the "instrumentality" prong was satisfied because of the quantity of drugs and drug paraphernalia found in the home and the continuity of criminal conduct on the property over the several years. It discovered that a family-owned-and-operated drug business was being run out of the house on a regular basis.

Turning to the "proportionality" prong of *Little Canyon Road*, the panel concluded that claimant had failed to make a showing of gross disproportionality. It noted that Claimant had been negligent or reckless in allowing drugs to be sold from and stored at his property and, indeed, had been directly involved in much of the criminal activity as evidenced by his several arrests and convictions. The panel further found that three years of continuing drug activity on the property had harmed the community by exposing the neighborhood to the effects of constant drug raids by police and by forcing neighbors to witness Claimant's family burying drugs in the backyard at night. Based on these factors, the panel concluded that the claimant was highly culpable and that the fair market value of the property ($21,000) was not disproportionate to his culpability. Finally, it held that any intangible value that the property held as a family home was more than outweighed by the continuing drug activity on the property and that the claimant had failed to make a showing of undue hardship resulting from the forfeiture. —*HSH*

United States v. Real Property Located at 25445 Via Dona Christa, ___ F.3d ___, 1998 WL 86185 (9th Cir. Mar. 3, 1998). Contact: AUSA Janet Hudson, ACAC15(jhudson).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Circuit indulged the presumption that the trial judge is in the best position to make that determination, and that the appellants bore the burden of offering evidence against the trial court's finding. "[U]pon examination," the court said, "[the appellants'] contentions amount to little more than surmise and speculation." The court deferred to the district court's factual determination.

The panel also rejected appellants' argument that their status as potential beneficiaries of the trust entitled them to the disclosure of the trustee's communications to the court. As for the confidential reports to be filed in the future, the court said that due process does not require their service on the appellants. "If it did," the court said, "any other non-party whose interests could be affected by a case would have the same right to personal notice." The mere fact that appellants are engaged in concurrent civil litigation with the trustee does not differentiate them in this regard from other interested parties, the court said. —*MLC*

Clifford v. United States, ___ F.3d ___, 1998 WL 61165 (D.C. Cir. Feb. 17, 1998). Contact: Trial Attorney Michele L. Crawford, AFMLS, Criminal Division, CRM20(mcrawfor).

Criminal Forfeiture / Ancillary Proceeding / Standing

- **If a third-party claimant is correct in asserting that property forfeited from the defendant was not, in fact, subject to forfeiture, the remedy is not to return the property to the third party, but to vacate the order of forfeiture and return the property to the defendant.**

- **Ownership of property that is not subject to forfeiture cannot be determined in the ancillary proceeding. If the property should not have been forfeited, the court has no subject matter jurisdiction over the property.**

- **Once the property is returned to the defendant, the third party retains all rights to litigate his interest *vis a vis* the defendant in a private civil action.**

When the defendant was convicted of racketeering, the court entered a preliminary order forfeiting all of the assets held by the defendant in the United States. Thereafter, the court amended the preliminary order several times to include specific assets as they were located and identified. One such amendment included a particular bank account in New York.

When the New York bank account was added to the order of forfeiture, a third party filed a claim in the ancillary proceeding alleging an interest in the funds in that account. It also alleged that the money in the account should not have been forfeited in the first place because it was not deposited into the account until *after* the defendant was convicted and the preliminary order was entered. The Government responded that the claimant lacked standing to contest the forfeiture of the subject funds and that a third party has no right to challenge the forfeitability of the property in the ancillary proceeding.

The court bypassed the standing issue and ruled only the forfeitability of the property. It held that the preliminary order of forfeiture applied only to property the defendant held at the time the order was

forfeitable assets. In neither statute does the authorizing language for pretrial restraints refer to the forfeiture of substitute assets.

United States v. Regan, 858 F.2d 115 (2d Cir. 1988), has often been cited for the proposition that the Second Circuit has authorized the pretrial restraint of substitute assets. The district court, however, construed the *Regan* decision to hold that substitute assets are restrainable only in certain unusual circumstances—*e.g.*, where the restraint of directly forfeitable assets would unduly burden third parties who have an ownership interest in those assets.

The court expressed sympathy with the Government's position, noting that it might make good policy sense to allow the Government to restrain the assets of a notorious racketeer pretrial so that they were available for forfeiture as substitute assets if a conviction were obtained. But, given what it considered to be the unambiguous language in the statute, the court said, this was something that Congress, not the courts, would have to fix. —*BB*

United States v. Gotti, ___ F. Supp. ___, No. 98-CR-42(BDP), 1998 WL 116631 (S.D.N.Y. Mar. 12, 1998). Contact: AUSA Bart van de Weghe, ANYSW01(bvandewe).

Comment: The district courts in the Second Circuit are divided in their interpretation of *Regan*. One court has rejected the reasoning applied in *Gotti*, reasoning that if the plain language of the statute authorizes only the restraint of directly forfeitable assets, there would be no justification for the *Regan* decision's holding that substitute assets are restrainable in cases where the restraint of directly forfeitable assets would unduly burden third parties. *See United States v. Bellomo*, 954 F. Supp. 630 (S.D.N.Y. 1996); *and United States v. Bellomo*, No. 96 CR. 460 (LAS), 1996 WL 938352 (S.D.N.Y. Sept. 16, 1996) (unpublished). The *Bellomo* court rejected the reasoning later espoused by the *Gotti* court, opining that the RICO statute either authorizes the restraint of substitute assets or it doesn't. It held that it does. On the other hand, *Gotti* is in accord with the decision of another district court that distinguished *Regan* and followed the decisions of the 10th courts of appeals that have prohibited pretrial restraint of substitute assets. *See United States v. Gigante*, 948 F. Supp. 272 (S.D.N.Y. 1996). Evidently, the Second Circuit will have to resolve this issue. It is likely that the *Gotti* decision will be appealed. —*BB*

Adoptive Forfeiture / Rule 41(e)

- **Eighth Circuit holds that appellant who received timely notice of administrative forfeiture and who did not contest forfeiture by filing claim and bond, was precluded from later judicially contesting forfeiture pursuant to Rule 41(e).**

- **Eighth Circuit concurrence warns that federal forfeitures, resulting from *de facto* adoption of local forfeitures to circumvent state statute, should be voided.**

A Missouri state patrol officer stopped Appellant for speeding. During a consent search of the vehicle, the officer discovered a secret compartment ultimately found to contain a large amount of cash. The cash was ultimately forfeited by DEA. Even though Appellant admitted that he received timely notice of the forfeiture from DEA, and that he had not contested the forfeiture by filing a claim and bond as required by 19 U.S.C. §1608, he subsequently moved the district court for return of the cash

Section 888 / *In Rem* Jurisdiction / Adoptive Forfeiture / Excessive Fines

- **Section 888(c) applies to seized conveyances, not to cash seized from a conveyance. In currency cases, the only requirement is that the Government institute the civil forfeiture action "promptly" once a claim and cost bond are filed.**

- **Converting seized cash into a cashier's check does not destroy *in rem* jurisdiction.**

- **State officials' failure to obtain "turnover order" pursuant to state law does not bar federal court from asserting *in rem* jurisdiction over adoptive forfeiture.**

- **Forfeiture of drug proceeds pursuant to 21 U.S.C. § 881(a)(6) never constitutes an excessive fine in violation of the Eighth Amendment.**

In May 1996, an Oklahoma Highway Patrol (OHP) officer stopped and searched a truck, discovering a large amount of cash secreted in the gas tank. Subsequently, the OHP turned the case over to the Federal Bureau of Investigation (FBI) for federal adoption of the forfeiture, and the seized cash was exchanged for a cashier's check. The FBI published notice of its intent to forfeit the money (because it was either the proceeds of or property used to facilitate drug transactions), and claimants filed claims and posted bonds. One hundred and one days later, the United States filed a civil forfeiture action. Claimants moved to dismiss the action because: (1) it was untimely; (2) the court lacked jurisdiction over the defendant property; (3) and the forfeiture would violate the Excessive Fines Clause of the Eighth Amendment. The court denied the motion.

Claimants argued that the forfeiture complaint was untimely pursuant to 21 U.S.C. § 888(c) (requiring that within 60 days after a claim and cost bond have been filed regarding a *conveyance* seized for a drug-related offense, the United States must file a forfeiture complaint). The court rejected this argument holding that the defendant cash was not a "conveyance" within the meaning of the statute. The court noted that the cash was seized without a warrant; therefore, forfeiture proceedings must be "instituted promptly" pursuant to 21 U.S.C. § 881(b). Here, the cash was seized and two and a half months later the claimants received notice that the FBI would seek forfeiture. One month later claimants posted their bonds, and three months later the case was filed. Based upon this timeline, the case was promptly instituted.

Claimants argued that the *res* in this case was the actual seized cash; because that cash was converted into a cashier's check, the court lacked possession of the *res*; therefore, the court lacked jurisdiction because the court must have possession of the *res* to maintain an *in rem* forfeiture proceeding. The court rejected this argument, finding that currency and cashier's checks are fungible and serve as a surrogate for each other in such circumstances. Thus, the conversion did not destroy *in rem* jurisdiction.

Claimants also argued that the court lacked *in rem* jurisdiction for another reason. Oklahoma law required the OHP to maintain possession of seized property and to obtain a "turnover" order from an Oklahoma judge prior to transferring seized property to the Federal Government. At the time of the transfer of the cash to the FBI, such an order had not been obtained. (The turnover order was not issued by a state judge until December 1997—after the federal forfeiture lawsuit had commenced.) Claimants

property, consisting of 602,000 shares of stock in the Canadian pharmaceutical company, Biochem Pharma, from forfeiture which would be transferred to him as compensation for his services. The United States contends that the funds were advanced to Bailey to pay the maintenance expenses on the French properties and did not constitute attorney's fees.

At the time that Bailey took possession of the shares of stock in May 1994, their value was $5,891,352. By January 1996, Duboc had discharged Bailey and retained other counsel, and the value of the shares had grown in excess of $16 million. Since Bailey was no longer counsel for Duboc, the United States demanded the return of the stock. When Bailey refused to return the shares, the United States initiated forfeiture proceedings against it. In February 1996, Bailey was incarcerated by order of the U.S. District Court for the Northern District of Florida for civil contempt for failing to return the shares of stock and provide an accounting. Bailey filed a claim in the forfeiture action asserting ownership in the shares of stock. He alternatively stated that the dispute involved a breach of contract under the Tucker Act, 28 U.S.C. § 1491, and filed a motion in the district court to transfer the case to the U.S. Court of Federal Claims. However, Bailey ultimately agreed to dismiss his petition with prejudice.

Thereafter, Bailey filed suit in the U.S. Court of Federal Claims for breach of an oral contract and sought an amount adequate to compensate for his losses, together with interest and costs and other further relief the court deems just and proper. The United States filed a motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted.

In ruling on whether the U.S. Court of Federal Claims had jurisdiction over the plaintiff's complaint, the Court noted that plaintiff must demonstrate a substantive right, enforceable against the United States for money damages, independent of the Tucker Act, 28 U.S.C. §1491, since that statute merely confers jurisdiction on the U.S. Court of Federal Claims and does not create a substantive right. The court further stated that its jurisdiction extends to express or implied-in-fact contracts, *i.e.*, those contracts that can be inferred from conduct, but does not extend to contracts implied-in-law, *i.e.*, where a promise is imputed to perform a legal duty. Since, pursuant to 21 U.S.C. § 853(i)(5), the Attorney General may "take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending disposition," the court reasoned that it is possible that Bailey could have entered into a contractual arrangement with the United States to preserve forfeited assets which had been owned by Duboc. The United States also argued that since Bailey did not make a claim for attorney's fees in the district court in Florida, which had jurisdiction over Duboc's criminal case (as he was invited to do), he was barred by the doctrines of *res judicata* and collateral estoppel. These doctrines, however, prevent re-litigation of a claim that has already had its day in court. The court found that the U.S. Court of Federal Claims is not the proper forum in which to determine whether, or in what amount, Bailey is entitled to attorney's fees for his representation of Duboc. Nevertheless, Bailey has constructed a claim requesting damages in an amount greater than $10,000, which at least in part, could not have been brought during Duboc's criminal proceeding. Accordingly, based on information currently before it, the court denied the Government's motion to dismiss—although it stressed that "this opinion is not a disposition on the merits of the plaintiff's allegations." The terms of the alleged contract and whether an authorized government official entered into a contract with the plaintiff remain to be resolved. —*LJS*

Bailey v. United States, ___ Cl. Ct. ___, No. 96-666C, 1998 WL 74216 (Cl. Ct. Feb. 10, 1998). Contact: Attorney Linda Samuel, AFMLS, Criminal Division, CRM20(lsamuel), and Deputy Director Sharon Eubanks, Commercial Litigation Branch, Civil Division, CIV02(seubanks).

19 U.S.C. § 1607 is "potentially enormous"; that no one but the owner of property seized for forfeiture can be relied on to protect the owner's interests in such property; and that, at least where the owner is in federal custody on the charges underlying the administrative forfeiture, there is no undue hardship to the seizing agency in ensuring that the owner-prisoner receive actual notice of the forfeiture proceeding.

Consequently, the **Second Circuit** held that, "[a]t least" where the federal agency is proceeding with an administrative forfeiture and the owner is a prisoner in federal custody on the charges that give rise to the forfeiture, delivery of certified mail notice of forfeiture proceedings to the custodial institution in which the property owner is incarcerated is inadequate unless the notice is in fact delivered to the intended recipient. The court stated that the mailing of notice with required return receipt signed not by the addressee but by the custodial institution is not a means of notification "such as one desirous of actually informing [the owner] might reasonably adopt." *Mullane*, 339 U.S. at 315. The court found such delivery "suspect" because the prisoner is entirely dependent on the custodial institution to deliver his mail to him and because the seizing agency easily should be able to secure the Bureau of Prisons' cooperation, as part of the same government and often as part of the same department of government, in assuring delivery to the prisoner and the creation a reliable record of such delivery. The panel vacated the judgment of the district court and remanded for a determination of whether the plaintiff in fact received the notices that were mailed to him in prison. —*JHP*

Weng v. United States, ___ F.3d ___, No. 96-2918 (2d Cir. Feb. 24, 1998). Contact: AUSA Leonard Lato, ANYEH01(llato).

Comment: The Second Circuit's decision in this case states that its due process requirement of actual delivery of notice sent to a prisoner in jail is consistent with similar rulings by the First and Eighth Circuits. The decision may be consistent with the Eighth Circuit *See United States v. Woodall*, 12 F.3d 791, 794-95 (8th Cir. 1993) ("As the Government is aware of the identity of prospective property owner, fundamental fairness requires that either the defendant or his counsel receive actual notice of the institution of a forfeiture proceeding."); *United States v. Cupples*, 112 F.3d 318 (8th Cir. 1997) (following *Woodall*). The First Circuit's adoption of *Woodall* is less clear. *See United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (quoting *Woodall*'s actual notice requirement with approval but holding only that seizing agencies must take steps to locate the prisoner and send him notice in jail). There is, however, a clear split in the Circuits. A due process requirement of actual notice to prisoners is contrary to the decisions in the Ninth and Tenth Circuits. *See United States v. Clark*, 84 F.3d 378, 381 (10th Cir. 1996) (nonreceipt by prisoner of notice of forfeiture sent by certified mail to him in prison does not negate the constitutional adequacy of the Government's attempt to provide him with actual notice there); *United States v. The Lido Motel*, 5145 North Golden State ___ F.3d ___, No. 96-15720, 1998 WL 47135 (9th Cir. Feb. 9, 1998) (the Government's efforts to notify the owner in prison satisfied due process despite failure to provide prisoner actual notice because, in addition to the Government having provided notice to the prisoner's attorney, the Government's certified mailing to the owner in jail had been signed for by an officer at the jail where such mail was routinely opened in the presence of the inmate, inspected for contraband, and distributed directly to the inmate) (March 1998 edition of *Quick Release*). Additionally, the Fifth Circuit and the D.C. Circuit, like the First Circuit in *Giraldo*, have not yet explicitly required that notice sent to prisoners in jail must actually be delivered to them to satisfy *Mullane* and due process. *See Armendariz-Mata v. United States Dept. of Justice*, 82 F.3d 679, 683 (5th Cir.), *cert. denied*, 117 S. Ct. 317 (1996) (MEMO: the Government must continue its notice efforts when notice sent to prisoner in jail is returned undelivered); *Small v. United States*, ___ F.3d ___, No. 97-5098, 1998 WL 66783 (D.C. Cir. Feb. 20, 1998) (same) (March 1998 edition of *Quick Release*).

Probable Cause / Airport Stop / Drug Courier Profiles / Dog Sniff Evidence

- **"Drug courier profile" can be used to justify *Terry* stop if supported by other evidence.**

- **Police had probable cause to seize defendant's car in parking lot, since automobile likely brought the defendants and the cocaine to the airport, thereby "facilitating" the transportation of the cocaine.**

- **Cash seized for forfeiture may be converted to a cashiers check; the Government is not required to preserve the cash as evidence, even if it relies on a positive dog sniff to establish the connection to drug trafficking.**

- **Evidence of a positive dog reaction to seized cash is admissible under Rule 403, provided the test is conducted under circumstances that establish its reliability. Dog sniff on cash in a drawer is not reliable without evidence that the drawer was "clean" before the cash was placed there.**

DEA agents on duty at the Nashville airport reviewed passenger reservation information compiled by the airlines and noted three passengers whose information exhibited typical characteristics of drug couriers: namely, the initial purchase of one-way tickets in cash, similar reservation call-back numbers, a drug "source" city destination, etc. One suspect, Ronald Akins, was known to the agent to have been arrested on marijuana charges in a nearby town, and the agent had previously arrested Akins' twin brother on drug trafficking charges.

The next day, the agent arrived at the airport to await the flight from Los Angeles, and saw Ronald Akins leaving the gate with another man, later discovered to be Carmack Odom. The agent approached Odom, who was carrying a duffel bag tightly under his arm, and asked to see Odom's identification. Thereafter, Odom ran away, carrying the duffel bag. The agent tackled him, and when he hit the ground, a pill bottle containing dilaudid, a bag of crack, and other items fell from Odom's person. The agent arrested Odom and confiscated the duffel bag. Ultimately, an agent searched Odom's duffel bag with his consent and found four kilos of powder cocaine. Odom indicated that he had used his life savings to buy the cocaine and that he was a drug dealer.

Meanwhile, another agent stopped Akins and another individual, Davidson, at the security checkpoint. The men stepped into a restroom, and when Akins was asked by the agent whether he was carrying any large sums of money or narcotics, Akins pulled out three thousand dollars from his pants pocket. The agent conducted a pat-down and found no narcotics on Akins, though he noticed that Akins was wearing two pairs of pants, which is a common method of hiding narcotics. Thereafter, Akins and Davidson were asked to go to the DEA office where Odom had been taken upon his arrest. A K-9 officer and his dog were called into the DEA office, and the dog indicated positively for the smell of narcotics in the desk drawer where the $3,000 taken from Akins was kept, and in the duffel bag that was carried by Odom and contained the cocaine. The agents confiscated the cash taken from Akins, and following standard procedure, converted the cash to a cashier's check the following day.

After the trip to the jail with Akins, the agents began to wonder whether Akins had driven to the

As to the sniff of the $3,000, the court stated that because the money itself was not "given to the dogs," but rather stored in a drawer in the desk, distinguishes this test from that of the money found in the trunk. "It is impossible to know what other substances were stored in the same desk drawer that contained the money," the court noted. (The opinion fails to mention any testimony regarding whether the room was "swept" by the dog prior to the introduction of the drugs into the room.) Under Rule 403, the court concluded that the test of the $3,000 had a higher potential of being inaccurate and, therefore, its introduction would be unfairly prejudicial.

—JRP

United States v. Akins,___F. Supp.___, No. 3-97-00068, 1998 WL 84597 (M.D. Tenn. Feb. 23, 1998). Contact: AUSAs Sonny A.M. Koshy, ATNM01(skoshy), and Jimmie Ramsaur, ATNM01(jramsaur).

Money Laundering

- **An attempt to mail currency derived from drug proceeds in interstate commerce is an attempt to conduct a financial transaction constituting a money laundering offense, which makes the currency subject to forfeiture under section 981.**

The Government filed a civil forfeiture action against currency derived from illegal drug activity. Claimant's attempt to mail the defendant currency was in a manner typically used by drug dealers. The currency was packaged to disguise the nature of the contents of the package, the shipper's address was false, and claimant used another person to mail the package for him. A Federal Express clerk, whose suspicions were aroused, opened the package and alerted state troopers who seized the currency. State forfeiture proceedings were commenced but were terminated for a procedural default. Before anyone could claim the money, the Internal Revenue Service seized it to initiate federal forfeiture proceedings on the grounds that the property was involved in a money laundering offense.

In reaching its decision, the court discredited the claimant's testimony that the currency was derived from gambling winnings. The court found the claimant was not employed and had not been employed at any time relevant to this case. Further, the claimant did not file tax returns with respect to the purported gambling winnings. Rather, the court found credible a witness' testimony that the claimant was actively involved in drug dealing which took place several months subsequent to the seizure of the currency. The court noted that this witness' testimony was supported by the fact that large traces of cocaine were found on the seized currency.

Since the claimant failed to prove that the defendant's money was his property from a legal source, the court held that it was subject to forfeiture under 18 U.S.C. §981(a)(1) because the "delivery of money to Federal Express was accompanied by the undisputed intention (and therefore an attempt) to effect the transport of the funds in question in interstate commerce. Therefore, for purposes of [s]ection 1956, there was an attempt to conduct a financial transaction." The attempted transaction was a money laundering offense, and the money was forfeitable as property involved in that offense.

—HSL

United States v. $66,020.00 in United States Currency, No. A96-0186-CV (HRH) (D. Alaska Feb. 23, 1998) (unpublished). Contact: AUSA Betsy O'Leary, AAK01(boleary).

in H.R. 1965 do not go far enough, and that the pro-law enforcement provisions that were added to the bill at the Department's request go too far in expanding federal forfeiture authority.

The Department has attempted to persuade Rep. Hyde to stick with the compromise. On March 30, 1998, however, Rep. Hyde sent a "Dear Colleague" letter to other Members of the House of Representatives announcing his intention to abandon H.R. 1965 and to offer an amendment to it on the House floor that would have the strong support of the anti-forfeiture groups. The letter was signed by the three leading forfeiture opponents in the House: Reps. John Conyers (D.-Mich.), Bob Barr (R.-Ga.), and Barney Frank (D.-Mass.). The proposed amendment would strip out all of the language of the 1997 compromise and replace it with Rep. Hyde's original bill. A vote on the amendment could occur in the first few weeks after Congress returns from the Easter Recess.

Law enforcement groups are contacting Members of Congress to voice their strong opposition to the Hyde-Conyers amendment to H.R.1965. EOUSA and the Office of Legislative Affairs are coordinating the efforts of the U.S. Attorneys. Detailed information on the provisions in each of the proposed bills is available from the Asset Forfeiture and Money Laundering Section. —*SDC*

Quick Notes

■ Administrative Forfeiture

A *pro se* claimant filed a motion for return of seized property under Rule 41(e), alleging that the forfeited funds were loan proceeds, not the proceeds of a counterfeiting offense. The district court—treating the motion as a civil complaint—dismissed it because, instead of raising a procedural objection to the administrative forfeiture, *i.e.*, a denial of due process, the claimant challenged the forfeiture on the merits. A district court, the court held, lacks jurisdiction over challenges to the merits of an administrative forfeiture.

Cruz v. U.S. Secret Service Asset Forfeiture Division, 1998 WL 107017, No. 97-CIV-6414(JGK) (S.D.N.Y. Mar. 11, 1998). Contact: AUSA David Finn, ANYS11(dfinn).

■ Section 2255 / Excessive Fines

In an unpublished opinion, the **First Circuit** holds that a claim that a forfeiture was excessive under the Eighth Amendment is not cognizable in a section 2255 proceeding because the request for relief is only from a monetary-type penalty and not release from confinement. The issue, the court said, is analogous to whether a defendant can use section 2255 to assert that he was entitled to a reduced restitution order in a criminal case. The court held that he cannot.

Rodriguez v. United States, 132 F.3d 30 (1st Cir. 1997) (Table Case). Contact: AUSA Richard Hoffman, AMA01(rhoffman).

■ Claim and Answer

A claim filed nearly two months after the filing deadline does not comply with Rule C(6), even though the claimant did file an answer within the prescribed time period. Accordingly, the Government's motion to strike both the claim and the answer should be granted.

United States v. $8,800 U.S. Currency, No. CIV-A-97-3006, 1998 WL 118076 (E.D. La. Mar.13, 1998). Contact: AUSA Tom Watson, ALAE01(twatson).

United States v. $14,876.00, No. CIV-A-97-1967, 1997 WL 722942 (E.D. La. Nov. 18, 1997) (unpublished) — Jan. 1998

United States v. $86,020.00 in U.S. Currency, ___ F. Supp.___, No. 96-CV-125-TUC-ACM, 1997 WL _____ (D. Ariz. Nov. 12, 1997) — Feb. 1998

United States v. $201,700.00 in U.S. Currency, No. 97-0073-CIV-HIGHSMITH (S.D. Fla. Jan. 5, 1998) (unpublished) — Feb. 1998

- ***United States v. Akins***, ___F. Supp. ___, No. 3:97-00068, 1998 WL 84597 (M.D. Tenn. Feb. 23, 1998) — Apr. 1998

Alien Smuggling

United States v. Williams, 132 F.3d 1055 (5th Cir. 1998) — Feb. 1998

Ancillary Proceeding

United States v. Holmes, 133 F.3d 918, 1998 WL 13538 (4th Cir. 1998) (Table) — Mar. 1998

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Motion *in Limine* / Impeachment

■ **District court asks the Government to explain the apparent discrepancy between its request that the defendants not be allowed to refer to the possibility of a large forfeiture if they are convicted, and the Government's request that it be able to use the possibility of forfeiture to impeach the defendants by suggesting they have a motive to lie.**

In a criminal prosecution that included a forfeiture prayer, the prosecution filed a motion *in limine* asking the court "to preclude, as irrelevant and prejudicial, evidence that if the defendants are convicted, they face lengthy prison terms and potential forfeiture of $24,535,540." In response, the court pointed out that the prosecution was being somewhat inconsistent in suggesting that while the defendants should not be allowed to refer to the forfeiture as a potential punishment, the Government should nevertheless be allowed to impeach the defendants on the ground that the potential forfeiture gives them a motive to lie. The court characterized the Government's position as follows:

> "[The Government] also argues that it should be able to use the possibility of forfeiture to impeach the defendants if their credibility or motive to lie is placed in issue. The loss of huge sums of money and property gives the defendants a motive to lie. In addition, the [G]overnment argues that the size, scope, length of time, and dollar amount of the defendants' unlawful conduct is relevant to determine the criminal intent or motive of each defendant."

Having noted the apparent discrepancy between these two government requests concerning the forfeiture aspects of the case, the court asked the Government for an explanation before it ruled on the motion *in limine*. —*BB*

United States v. Palumbo Bros. Inc., No. 96-CR-613, 1998 WL 676232 (N.D. Ill. Feb. 3, 1998) (unpublished). Contact: AUSA John H. Newman, AILN02(jnewman).

Legislation

■ **Rep. Hyde retreats from efforts to reach a compromise on civil asset forfeiture reform; he announces his intention to bring his original bill to the House floor.**

In 1997, Rep. Henry Hyde (R.-Ill.), Chairman of the House Judiciary Committee, introduced a bill, H.R. 1835, that would substantially curtail law enforcement's ability to use civil forfeiture as a law enforcement tool. When the Department of Justice opposed the bill, Rep. Hyde agreed to a compromise that would make significant reforms to civil forfeiture procedure without making the process unduly burdensome. The compromise bill, H.R. 1965, was reported out of the Judiciary Committee by a vote of 26-1 last June. *See Quick Release* [July 1997]: 1.

In February 1998, Rep. Hyde sent a letter to Attorney General Reno stating that efforts to move the compromise bill forward were stalled due to "strong opposition from various quarters." That opposition, of course, is coming from the criminal defense bar, the National Rifle Association, and other anti-forfeiture groups who believe that the "reforms"

airport, since he was overly concerned about his car keys. The agents located Akins' BMW and saw on the dashboard a Tennessee identification card bearing the name "Carmack Odom." The officers impounded the car and did an inventory search. Inside, they found a gray tool box containing $32,219 in cash, for which a drug dog also indicated positively for the scent of drugs. The officers also converted this cash to a cashier's check the next day. Akins and Odom were charged with drug conspiracy and possession with intent to distribute cocaine, crack cocaine, and dilaudid.

The court addressed a number of suppression issues with respect to the initial seizures of both Odom and Akins and concluded that the respective investigations of Odom and Akins were justified, in part upon the suspects' matching "drug courier profile" characteristics. The court stated, however, that the profile, while helpful to drug enforcement officers in identifying possible traffickers of narcotics, cannot, in and of itself, suffice to support a *Terry*-type investigatory stop. Nevertheless, the drug courier profile can be used to justify a *Terry* stop if supported by other evidence, which the court found did exist in each of the cases. The court concluded that, based upon the agents' investigation and actions and statements by the defendants themselves, probable cause existed to arrest both Odom and Akins.

The court also stated that the seizure of the BMW, pursuant to federal forfeiture law without a warrant, was justified, since it was reasonable for the officers to believe that the car had been used to transport Akins, Davidson, and Odom to the airport to facilitate the transport of a large quantity of cocaine. The seizure of the $32,219 from the box in the trunk was also justified, since if police have probable cause to seize a vehicle for forfeiture, they may search the car without a warrant (citing *United States v. Decker*, 19 F.3d 287 (6th Cir. 1994) (per curiam)). The opening of the locked storage box was permissible because if police have probable cause to search a vehicle, they may also search any container in the car, which may have items which are the object of the search. Additionally, it was permissible as part of an inventory search of the vehicle's contents.

Akins contended that the officer's immediate conversion to a cashier's check of the cash found on his person and that found in the locked box in the car, violated his Fourteenth Amendment rights. He further contended that the evidence of a positive dog reaction for the presence of drugs on these two quantities of cash should be inadmissible at trial as irrelevant evidence, particularly where he was not present at the time the quantities were subject to a canine search and that the conversion of the cash to a cashier's check precluded him from testing the cash himself. The court rejected Akins' Fourteenth Amendment claim, since he did not prove that the police, in bad faith, failed to preserve potentially exculpatory evidence. The court stated that the remedy of excluding evidence is limited to those compelling cases where the police themselves believed that the evidence was potentially exculpatory, and for this very reason failed to preserve it.

Concerning the admissibility of the canine sniff evidence, the court believed that the proper inquiry to be made with regard to whether the Federal Rules of Evidence bar the admission of the dog sniffs is under Rule 403, which permits a court to exclude otherwise relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice." The court noted initially that several recent opinions have discussed the unreliability of canine sniff searches of money. The court cited the usual studies claiming that up to 96 percent of the currency currently in circulation is tainted. The court also noted that at lease one court in the same district had concluded that the probative value of evidence of a dog's alert to the presence of drugs is so "microscopic" as to be inadmissible, citing *Jones v. United States Drug Enforcement Agency*, 819 F. Supp. 698, 720 (M.D. Tenn. 1993). Nonetheless, as to the reaction to the cash taken from the trunk, the court held the admission of such evidence would not unduly prejudice the defendant, since the Government could prove through other evidence that the defendant was in some way connected to drugs. According to the court, however, when the evidence of the dog alert is supported only by other circumstantial evidence, its admission may unduly prejudice the defendant.

Notice

■ Government's failure to send notice of administrative forfeiture to owner named on passbook for seized savings account renders forfeiture void for inadequate notice.

U.S. Customs agents seized a savings account passbook during the search of a defendant's house in connection with his arrest. The seized passbook listed someone other than the defendant as the record owner of the account. The U.S. Customs Service withdrew the money from the account and instituted an administrative forfeiture proceeding against it by sending notice to the defendant only. The criminal case against the defendant was dismissed, and after the defendant failed to file a cost bond or to provide Customs with evidence of his financial inability to do so, Customs administratively forfeited the money. The record owner of the savings account then moved for return of the seized property under Rule 41(e).

The district court found that it had jurisdiction to hear the owner's due process attack on the forfeiture for inadequate notice, *see United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995), and ruled that although the related criminal case had been dismissed, the Rule 41(e) motion could be heard as a "civil equitable proceeding." *Id.* (citing *United States v. Martinson*, 809 F.2d 1364, 1366-67 (9th Cir. 1987). The court pointed out that 19 U.S.C. §1607(a) requires that written notice of the seizure and of the procedures for administrative forfeiture proceedings be sent to any person who appears to have an interest in the seized property. In addition, the court pointed out that to be constitutionally adequate, due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

The court ruled that, given the undisputed appearance of the name of the record owner on the savings account passbook that had been seized by the U.S. Customs Service and given the availability of the record owner's address from the bank that held the account, Customs' unexplained failure to send notice to the record owner violated both the statutory notice requirement of section 1607 and minimum due process standards. The court stated that the owner had the right to have notice sent to her personally under these circumstances and that providing notice only to someone other than the owner could not be said to have been reasonably calculated to apprise the owner of the action. Consequently, the court concluded that the administrative forfeiture was void because of inadequate notice, and ordered the Government either to return the money to the owner or to begin judicial forfeiture proceedings. —*JHP*

United States v. Colon, ___F. Supp. ___, No. CRIM-94-366(PG), 1998 WL 81633, (D.P.R. Feb. 20, 1998). Contact: AUSAs Jeanette Mercado, APR01(jmercade), Jorge Vega, APR01(jvega), and Joseph Hoffer, APR0(jhoffer).

Notice

■ **Second Circuit rules that notice of administrative forfeiture mailed to potential claimant's place of incarceration is not adequate unless actually delivered to him there.**

The Federal Bureau of Investigation (FBI) initiated administrative forfeiture proceedings under 21 U.S.C. § 881 against jewelry and currency seized from the owner's residence at the time of his arrest on narcotics charges. The owner was taken into federal custody where he remained until completion of his sentence pursuant to a guilty plea. The FBI prepared two separate written notices (one for the jewelry and one for the currency), published them, and sent the owner copies by certified mail to his last known address and to the local federal detention facility. The copies mailed to the owner's last known address were returned undelivered. According to the certified mail receipts, the currency and jewelry notices were received at the detention facility about five weeks apart. No claims were made for either the currency or the jewelry, and the FBI administratively forfeited them.

Four years later, the owner filed a civil suit for recovery of the currency and jewelry on the grounds that he had received no notice of the forfeiture proceedings. He pointed out that he had been transferred several times between the detention facility and another prison during the time when the notices were sent and that it was therefore "very questionable" whether he was at the detention facility when the notices arrived. The district court ruled that the FBI's mailing of the notices to the detention facility where it believed that the owner was located satisfied the Government's due process obligation to provide reasonable notice. The owner appealed and submitted documents that indicated that he was at the detention facility when the currency notice was sent but was not there when the jewelry notice was sent.

On appeal, the **Second Circuit** began by pointing out that due process requires that notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections, and the means employed must be one that a person desirous of actually informing the absent person might reasonably adopt. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). The panel then reviewed cases concerning the due process obligation of the Government, when it seeks to give notice of forfeiture to someone it knows is in its custody, to send notice to that person's place of confinement. Although the court conceded that due process would be satisfied, in appropriate circumstances, by giving notice to the property owner's attorney, the court concluded that: "[a]bsent special justifying circumstances, the least that can be asked of a [F]ederal [G]overnment agency seeking forfeiture of the property of a federal detainee is that it determine where the claimant is detained and send the notice to the right institution." Accordingly, the court ruled that, if the property owner was incarcerated elsewhere when the jewelry notice went to the detention facility, the jewelry notice was inadequate on that basis alone.

The currency notice presented a different situation, given that it was agreed that the defendant was present in the detention facility where the notice was sent. Nevertheless, the **Second Circuit** ruled that notice sent to a prisoner's custodial institution must actually be delivered to him in order to satisfy due process. The court pointed out that *Mullane* makes clear that the type of notification required varies with a number of factors including: the nature of the interests involved; the likelihood that others similarly situated will protect a property owner's interests; and the reasonableness of imposing more onerous notice requirements on the entity obligated to provide notice. *Id.* at 314-20. The court found that the property interest involved in the administrative forfeiture of assets up to a value of $500,000 pursuant to

argued that the transfer violated state law and was, therefore, invalid. They alleged that the invalid transfer prevented the court from exercising *in rem* jurisdiction over the cash. Claimants also argued that the tardy turnover order could not ratify the illegal transfer and remedy any jurisdiction defects.

The court agreed that the transfer, prior to the issuance of a turnover order, had violated state law. Nevertheless, the court found that it possessed *in rem* jurisdiction. The court found that the facts of the case and the turnover order stating that the FBI was the appropriate agency to receive the cash, satisfied that Oklahoma had been given its right of first refusal of the seized cash, that the cash had not been transferred in an attempt to circumvent state laws governing the disposition of forfeited property, and that the state law had been substantially complied with. The court accorded weight to the testimony of an OHP officer who stated that the cash was transferred to the FBI primarily because the ensuing case would involve a multinational investigation, and the FBI was better equipped to handle such an investigation than the State. Therefore, the cash was not transferred for an improper reason.

Moreover, the court found that *in rem* jurisdiction had existed from the beginning of the case, even before the issuance of the state turnover order. Compliance with the state's requirement for a turnover order was not a jurisdictional prerequisite for the federal court; rather, as a matter of comity and respect for the sovereignty of Oklahoma, the court had sought to abide by state law and have a state judge issue a turnover order. The court found that because the FBI had exclusive possession of the seized cash, the court could exercise *in rem* jurisdiction over the property despite any alleged procedural infirmities associated with the seizure and/or transfer of the property.

Finally, the court rejected the claimants' argument that the forfeiture of the cash "for a mere traffic violation" constituted an excessive fine in violation of the Eighth Amendment. The forfeiture was clearly based upon the fact that the cash constituted either the proceeds of, or facilitated an illegal drug transaction. And as a matter of law, forfeiture of drug proceeds pursuant to 21 U.S.C. § 881(a)(6) could never be constitutionally excessive. —*MSB*

United States v. $189,825.00 in United States Currency, No. 96-CV-1084-J (N.D. Okla. Feb. 11, 1998) (unpublished). Contact: AUSA Catherine DePew, AOKN01(cdhart).

Court of Federal Claims / Tucker Act / Attorneys' Fees

- **Court of Federal Claims denies Government's motion to dismiss defense attorney's action based on allegation that Assistant United States Attorney (AUSA) promised him that he could retain portion of defendant's forfeitable property as a fee.**

Plaintiff F. Lee Bailey represented Claude DuBoc, who was indicted in the Northern District of Florida on drug trafficking and money laundering charges. In the course of the criminal proceedings in Florida, Duboc entered into a plea agreement with the United States in May 1994 and agreed to forfeit the proceeds from his drug trafficking, most of which was foreign-based property. Bailey was to have facilitated the forfeitures by assisting his client in the maintenance, liquidation, and repatriation of substantial foreign assets, including boats, vehicles, and homes in France. In exchange, Bailey contends that the United States Attorney's Office for the Northern District of Florida agreed to exempt certain

pursuant to Rule 41(e). The motion was denied, and the **Eighth Circuit** affirmed in a one paragraph decision, stating only that, "In these circumstances [*i.e.*, where there has been timely notice and no claim or bond has been filed] the district court properly rejected [appellant's] attempt to collaterally attack the administrative forfeiture."

A concurrence to the appellate decision agreed with the holding but stated that the actions of DEA and state highway patrol had violated the Missouri Constitution. "While I agree that [appellant] may not collaterally attack the forfeiture in this case," the judge said, "I would void any such federal forfeiture that is timely presented for direct judicial review."

The Missouri Constitution requires that property forfeited by the state be distributed to the schools. To strengthen this provision, a state statute requires that locally seized property cannot be adopted by the Federal Government without a court order. Here, after the state patrol officer stopped the vehicle and discovered the secret compartment, he took the appellant to the Highway Department. Only then was a DEA special agent contacted, and together, the agent and the state patrol officer opened the secret compartment and found the cash. Federal forfeiture proceedings were then begun without an adoption, presumably on the theory that the DEA agent had seized the currency rather than the state patrol officer.

The concurring judge believes that this was a subterfuge designed to work around the Missouri law. Because the appellant, his car, and its contents were seized not by DEA but by the state patrol officer, it was pure legal fiction to suggest that this was a federal action. In the judge's view, the action by federal law enforcers was contrary to the spirit, if not the letter, of the Department of Justice Adoption Policy and Procedure issued by the Executive Office for Asset Forfeiture (now the Asset Forfeiture and Money Laundering Section) as Directive No. 93-1. —*MSB*

In re: U.S. Currency, $844,520.00 v. United States, ___ F.3d ___, 1998 WL 65473 (8th Cir. Feb. 19, 1998). Contact: AUSA Francis Reddis, AMOW01(freddis).

Comment. Directive No. 93-1, the current version of which appears as Chap. 4, Sec. I, of the *Asset Forfeiture Policy Manual* (1996), established policies and procedures for federal adoptions of state and local seizures. The intent of the directive is to ensure consistent review and handling of state and local seizures presented for federal adoption. The directive requires that all state and local adoption requests must be submitted within 30 days from the date of seizure and reviewed — and promptly accepted or declined — by the adopting federal agency. The request must be accepted prior to the transfer of the property to federal custody, unless exceptional circumstances exist. Normally, the federal review will be conducted by an attorney outside the chain-of-command of operational officials. Such legal review shall verify that: (1) the property is subject to federal forfeiture, (2) there is probable cause to support the seizure, (3) the property is not within the custody of a state court, and (4) there is no legal impediment to a successful forfeiture action. —*MSB*

entered and did not apply to all property that the defendant might later acquire. Therefore, the court held, the money in the New York account was not subject to forfeiture and the third party's claim should be granted. *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of Bank Austria)*, 1997 WL 695668 (D.D.C. Aug. 26, 1997).

The Government then filed a motion for reconsideration. It argued that, even if the property should not have been forfeited in the first place, the remedy should not be to grant the third party's petition in the ancillary proceeding if the third party lacked standing. Awarding the property to a third party with no interest in the property, just because that party happened to be the one to point out a defect in the forfeiture order, the Government said, would result in an undeserved windfall for the third-party claimant. Therefore, the Government argued, the court should first have ruled on the standing issue and should have dismissed the third-party claim without reaching the question of whether the property was forfeitable.

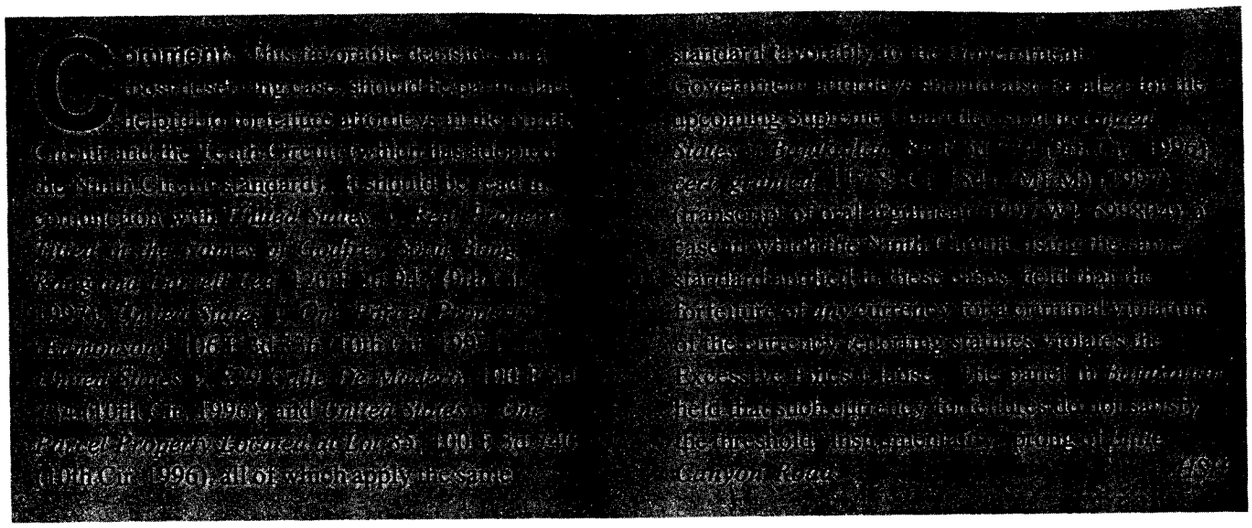
The court granted the motion for reconsideration, but on different grounds. Because the property was not subject to forfeiture, the court said, litigation over its true ownership should not have taken place in the ancillary proceeding. Instead, the court held, what it should have done was to amend the preliminary order and order the Government to return the property to the defendant. In that way, the court could correct the error committed when it included property that was not subject to forfeiture in the preliminary order without assuming the merits of claimant's assertion of a legal interest and handing the claimant a windfall. Accordingly, the court amended the preliminary order to strike the New York bank account, directed the Government to return the money to the defendant, and dismissed the third-party claim for lack of subject matter jurisdiction. *See United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of Zaman and Bhandari)*, 977 F. Supp. 20 (D.D.C. 1997) (court must dismiss petition for lack of subject matter jurisdiction if the property claimed by the claimant was not listed among the assets forfeited from the defendant). The third party remains free to file a civil action against the defendant if it still believes that it has a legal interest in the subject property. —*SDC*

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Bank Austria), ___ F. Supp. ___, No. 91-0655 JHG, 1998 WL 87418 (D.D.C. Feb. 23, 1998). Contact: Assistant Chief Stefan D. Cassella, AFMLS, Criminal Division, CRM20(scassell).

Restraining Order / Substitute Assets

■ **Distinguishing Second Circuit precedent, district court in New York holds that substitute assets may not be restrained pretrial.**

The Government filed RICO and money laundering charges against organized crime figure John Gotti and others. Because the proceeds of the offenses were no longer available, the Government moved for a pretrial order restraining substitute assets. The district court denied the motion, holding that neither 18 U.S.C. § 982(b)(1)(A) (which incorporates the pertinent language of 21 U.S.C. § 853) nor section 1963(d)(1)(A) authorizes the restraint of substitute assets. The court's conclusion is based principally upon a plain reading of the statutes. The language of each of these statutes authorizing the issuance of pretrial restraining orders refers only to that part of the same statute which concerns directly



Criminal Forfeiture / Trustee / *Ex Parte* Proceedings

- **District court may properly engage in *ex parte* communications with trustee appointed by the court to liquidate property subject to criminal forfeiture regarding the subject matter of the appointment.**

- **Third parties who have filed civil actions against the trustee that are pending before the same trial judge have no right to intervene in the criminal forfeiture case for the purpose of learning the nature of communications between the court and the trustee.**

Defendant entered a guilty plea to racketeering charges and consented to the forfeiture of its assets in the United States. To facilitate the forfeiture of Defendant's 61 percent interest in a corporation, the district court appointed a trustee to liquidate the corporation. *See United States v. BCCI Holdings (Luxembourg) S.A. (Application of Clifford and Altman)*, 980 F. Supp. 496 (D.D.C. 1997). In the course of his administration of the liquidation, the trustee submitted confidential reports to the court and had other confidential communications with the judge.

The trustee, however, soon became involved in a series of private lawsuits with the appellants who were third parties with alleged interests in, and claims against, the corporation. These lawsuits were assigned to the same judge.

The appellants, who were not parties to the criminal forfeiture proceeding, moved the district court to intervene in the forfeiture proceedings to obtain access to and disclosure of the confidential reports and other communications, and any future confidential dealings, between the trustee and the judge in the criminal forfeiture case. The appellants argued that such communications could give the trustee an unfair advantage in the civil cases against them. The appellants did not request recusal of the judge.

The district court denied the motion. It ruled that the contents of the communications did not concern the merits of the civil actions. On appeal, the **D.C.**

The **Ninth Circuit** affirmed, and in so doing, limited *$277,000* to cases where the Government earns no interest at all on seized funds. With respect to the defendant's first point, the court said the following:

> "We agree with the [G]overnment that *$277,000*'s 'alternative borrowing rate' has no application where seized funds are deposited in an interest-bearing account. Under these circumstances, the funds 'actually' earn interest at the prevailing government rate and there is no need to treat them as 'constructively' earning interest at the [G]overnment's alternative borrowing rate."

On the second point, the court rejected the notion that the Government should have invested the defendant's money in longer-term securities so that it could have enjoyed a higher interest rate. "As the [G]overnment may only be ordered to disgorge its benefit, it doesn't matter that it (and in turn [the defendant]) might have benefitted more by a different investment strategy." The extent to which the Government benefitted from the seizure of the defendant's money is measured precisely by the interest it actually earned, the court concluded, and that is all that the Government is required to disgorge.

—SDC

United States v. $133,735.30 Seized From U.S. Bancorp Brokerage Account, ___ F.3d ___, 1998 WL 125047 (9th Cir. March 23, 1998).
Contact: AUSA Leslie Westphal, AOR01(lwestpha).

Excessive Fines

- **Ninth Circuit rejects Eighth Amendment challenge to civil forfeiture of residence; in light of long-running drug trafficking activity, forfeiture of family home was not grossly disproportionate to the criminal offense.**

The Government filed a civil forfeiture action against a residence after the owner and his family members were involved in several drug-related encounters with law enforcement, all of them involving the defendant real property. The claimant was first arrested in the 1980s after police observed him making a sale of marijuana in a commercial parking lot. They later developed information that the claimant took orders for marijuana on his residential telephone, and a family friend provided the police with a list of the claimant's drug clients which the friend had obtained from inside the claimant's house.

The claimant was arrested again a year later after police received a tip that he was selling marijuana on a daily basis. A cooperating witness placed an order for marijuana on the claimant's residential telephone and then purchased the marijuana from the claimant at a commercial parking lot. Two years later, the claimant was arrested yet again after police executed a warrant at claimant's house and seized: six baggies containing a total of 250 grams of marijuana, a small amount of marijuana from the claimant's pocket, baggies with marijuana residue in the kitchen, another empty baggie in the claimant's bedroom, and five portable scales.

Two months later, the police executed another warrant at the home, which resulted in the seizure of two large baggies containing 862 grams of marijuana and several smaller packages and scales. The claimant was not present during this search, but his son was arrested on marijuana and cocaine charges. Three months later, the police executed another warrant at the home. When the claimant heard the police arriving, he ran to the bathroom and unsuccessfully attempted to flush 68.3 grams of marijuana down the toilet. The police seized this